SUPREME COURT, U. S.
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SUPREME COURT OF THE UNITED STATES

No. 612

HY-VEE FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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I
STATEMENT

This is a Petition for Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Eighth Circuit entered June 29, 1970, and the decision made and entered June 5, 1970, denying the Petition of the Petitioner herein to review the decision and to set aside the order of the National Labor Relations Board. Orders by the Court were entered June 29, 1970 and on July 23, 1970, which stayed the execution of the judgment, until August 12, 1970, and it provided that if within said period of time, there is filed with the Clerk of

the Circuit Court a certificate of the Clerk of the Supreme Court of the United States that a Petition for Writ of Certiorari and Certified Record have been filed in his office, said stay shall continue until the final disposition of the case by the Supreme Court.

The Circuit Court's decision is reported in ... F. 2nd, page .... Said decision, judgment and stay order are set out verbatim in the Appendix attached hereto, and also in the Record certified by the Clerk of the Circuit Court which is filed herein.

The original decision and order of the National Labor Relations Board was entered May 21, 1969, and is reported at 176 National Labor Relations Board, No. 5; 71 LRRM 1271, and also in 1969 Commerce Clearing House, NLRB Cases, page 26446.

The supplemental decision and order of the National Labor Relations Board was entered September 24, 1969, and is reported at 178 NLRB No. 101; 72 LRRM 1190, and also in 1969 Commerce Clearing House, NLRB Cases, page 27196. Said National Labor Relations Board Decisions are set out at pages 32 and 34 of the Appendix which is part of the Record certified to this Court by the Clerk of the Circuit Court. Said Circuit Court Decision, Judgment and Stay Order are also set out in the Appendix attached to the Petition.

II

STATEMENT OF JURISDICTIONAL GROUNDS

The factual basis for this case arose in the Meat Department of the Grocery Store of Hy-Vee Food Stores, Inc. at Kirksville, Missouri. The Department consisted of six employees. The store had approximately 53 employees, and consisted of the usual departments. Two employees in

the Grocery Department were discharged for failure to perform their work properly. Marjorie Gibbons, a meat wrapper in the Meat Department, because of the discharge of these two grocery employees, feared that others in the store and particularly in the Meat Department would also be discharged. She talked it over with Mr. Stanley, a meat cutter, and they decided that the employees in the Meat Department needed job security and that they should get the Meat Cutters Union to represent them and to protect their jobs. They contacted Mr. Wolff, the representative of the Union, and he held two meetings with the employees at which five signed representation authorization cards and gave them to Mr. Wolff. Mr. Wolff then called on Adam Marshall, the manager of the store on the morning of August 6, 1968, and orally and in writing requested recognition and the commencement of bargaining. Mr. Marshall was surprised, and inquired of Mr. Wolff as to the reasons for the employees going to the union. Mr. Wolff gave him a list of things but the principal one was job security against the rumored lay-offs. During the conversation, Mr. Wolff told Mr. Marshall that the employees were in the store and that if he wanted to talk to them and to find out from them their reasons he should do so. Mr. Marshall and Mr. Clemons, the Vice President of Hy-Vee Food Stores, Inc., then talked to each of these employees as to their reasons for going to the union. The employees told them that when the two grocery department employees were discharged they became fearful that some of them would also be discharged and they went to the union for job security. Mr. Marshall and Mr. Clemons explained to them that the two grocery department men were discharged for incompetency and that there was no thought or danger of discharging any of them as long as they continued to do good work. They assured them that they were doing good work. As a result, three of the employees talked the matter over and without any suggestion on the

part of the company representatives, they each wrote a letter to the union rescinding and cancelling their previously executed union authorizations. They told Mr. Marshall that they had done this. Mr. Marshall had previously agreed to meet with the union on August 19, 1968. This information that the three had withdrawn was given to him on August 14, 1968. Mr. Marshall then wrote the union a letter stating that he was informed that the union did not represent a majority of the employees, and that there would be no occasion for the meeting on August 19, 1968.

The union then filed charges with the Regional Director of the National Labor Relations Board at Kansas City, Missouri, that Mr. Marshall and Mr. Clemons had committed unfair labor practices in allegedly inducing these employees to cancel their union authorizations. Without elaboration this brief statement of the basic situation will be sufficient for an understanding of the procedures and the basis for jurisdiction of this Court.

This case originated with a Complaint issued by the Regional Director of the National Labor Relations Board at Kansas City, Missouri, charging petitioner with unfair labor practices allegedly prohibited by the National Labor Relations Act. Petitioner filed an Answer thereto, both of which are set out in the Appendix in the Certified Record on file herein. The matter was heard by a Trial Examiner on December 19, 1968, who made and recommended a decision and order to the Board. The Board accepted said recommendations and entered its order as above stated on May 21, 1969. Thereafter the Board on its own motion re-opened the case and requested additional statements by the parties which were given. The Board then made its supplemental decision on September 24, 1969, as above stated. The Petitioner herein petitioned the Court of Appeals for a review of said Board Decision as

provided in Section 10 (f) of the National Labor Relations Act. Also the Board then petitioned the Court for an enforcement order by the Court. The decision of the Court of Appeals affirmed the decision of the Board finding petitioner herein guilty of unfair labor practices, and ordered enforcement thereof, which required Hy-Vee to negotiate with the union. This Petition for Writ of Certiorari is authorized and permitted by the National Labor Relations Act.

Section 10 (f), (28 USCA Section 1201) of the National Labor Relations Act provides that a party aggrieved by a final order of the Board may secure a review of such order in the Circuit Court of Appeals of the United States in the Circuit wherein the unfair labor practice is alleged to have occurred. Section 10 (e), (28 USCA Section 1201), of the National Labor Relations Act provides that the Board may petition the Court of Appeals of the United States in the Circuit where the alleged unfair labor practice occurred, for a Court Order directing the enforcement of its order. Both paragraphs 10 (e) and (f) provide that the Court shall review the record before the Board, and both paragraphs provide that the findings of the Board with respect to questions of fact must be "supported by substantial evidence on the record considered as a whole." It is further provided in the last sentence in subsection (e), that the decision and judgment of the Circuit Court may be reviewed by the Supreme Court of the United States upon a Petition for a Writ of Certiorari.

Jurisdiction is given under the provisions of c. 646, 62 Stat. 928; 28 USCA, Section 1254 (1).

Supreme Court Rule No. 23 prescribes the contents of a Petition for Writ of Certiorari, and we are following said provisions herein.

III

QUESTIONS PRESENTED FOR REVIEW

The nature of this case will require some repetition of evidence in order to comply with Rule No. 23. Such will be necessary to give this Court knowledge and an understanding of the situation and of the nature of the errors committed not only by the Circuit Court of Appeals, but also by the Board and the Trial Examiner. It will be noted at the outset that the Court in its decision filed June 5, 1970 made no mention of the errors assigned in the petition for review and did not discuss any of them. The decision abstractly states that there were three questions presented; namely (a) whether there is substantial evidence on the record as a whole to support the Board's findings; (b) whether the order requiring the company to bargain with the Union is appropriate under the circumstances of the case; and (c) whether the Board's unit determination is proper. The Court then states that it finds that the decision and order of the Board was correct and proper. It is surprising to note that with such serious and specific attacks upon the Board's decision, and the fact that there is no answer to our statement of errors in the decisions, the Court did not see fit to even discuss any of such serious charges.

This presents a rather serious legal situation, because an employer can be arbitrarily deprived of basic property and personal rights, by the distortion and misstatements of evidence by an obviously prejudiced trial examiner, and the superficial acceptance of the trial examiner's findings and recommended orders without reading the evidence.

Also, we feel sure that the Circuit Court panel of three Justices who were assigned this case, due to the volume of work, must have failed to read and examine the evidence. Otherwise, they could not have affirmed the Board decisions.

In order to understand the procedures followed by the Board herein, it is necessary to know the skeleton background facts. We will not attempt here to go into the details of the facts. We believe there will be no material dispute of the following statement of facts. To avoid undue repetition, we will discuss the true record and evidence in more detail in our Argument.

This case involves the six employees in the Meat Department of the company's retail grocery store in Kirksville, Missouri. This is one of 63 chain stores operated by the company at the time principally in Iowa and along northern Missouri. At the time in question herein there were a total of approximately 53 employees in the Kirksville store. The store building was radically remodeled during the period from February to July, 1968. During that period and because of the confusion there was a marked reduction in customer business and there was no profit. After the remodeling was completed and full operations resumed there was a remarkable increase in customer business and profits from then on. The remodeling paid off. During this remodeling period two employees in the Grocery Department were discharged because of their inefficiency and failure to do their job. A rumor went through the store because of these two discharges and the obvious reduction in customer business due to the remodeling operations, that the management was going to discharge and lay off a number of other employees throughout the store. This caused some discussion among five employees in this small Meat Department. Mrs. Gibbons, who had been a meat wrapper for a number of years, talked with Mr. Stanley, a meat cutter, and they expressed the fear that there would be some of the employees of the Meat Department laid off, and part time employees hired in their places. There was no basis for this fear. However, Mrs. Gibbons called Mr. Wolff, the representative of the Meat Cutters Union, and arranged a meeting with

him at which five of the employees were present. They expressed to Mr. Wolff their fear of loss of jobs, and inquired that if they joined the Union could it help them with their job security. He explained how union contracts work and about seniority provisions in the contract. The five employees decided that they needed the union for their job security, and signed cards which Mr. Wolff had with him, authorizing the union to be their bargaining representative. A second meeting was held by Mr. Wolff with the employees at which Mr. Smock, the Supervisor in the Meat Department, was invited to attend with the idea that they hoped he would join the union and go along with them. He attended the meeting but declined to join or go along.

On August 6, 1968 Mr. Wolff, the union representative, called on Mr. Adam Marshall, the store manager, at his office in the store. Mr. Wolff told Marshall that he represented a majority of the employees in the Meat Department and that he was requesting recognition and that they proceed immediately to negotiate a contract. The union already had a contract at another store in Kirksville, known as the Green Hills Store. Mr. Wolff presented a copy of that contract to Mr. Marshall as a proposal for the Hy-Vee store. He had written on the front page of that copy of the Green Hills Store Contract "Contract Proposal for Meat Department employees of Hy-Vee Store, Kirksville, Missouri." Mr. Marshall then took the time to go through the Green Hills Contract and to ask some questions about it. Mr. Marshall told Mr. Wolff that he was unfamiliar with these matters and that he would have to take them up with the main office at Chariton, Iowa. Mr. Wolff told Mr. Marshall that the principal reason these employees wanted the union to represent them and wanted a union contract, was to secure job security because of their fears that some of them might be discharged, as the result of the rumor in connection with the

discharge of two grocery department employees. Mr. Marshall could not understand why they went to the union, and Mr. Wolff then invited Mr. Marshall to talk to the employees and stated that they were there in the store and available. Mr. Wolff thereby specifically invited Mr. Marshall to talk with these employees about their reasons for wanting the union. It was these conversations by Mr. Marshall and Mr. Clemons, vice president of the company, with these employees which became the basis for the so-called unfair labor practice charges subsequently filed with the Board by the union.

Briefly, Mr. Marshall and Mr. Clemons explained to these employees that the two Grocery Department men were discharged because of their unsatisfactory work, and that the Meat Department employees had all been doing good work, and there was no thought of discharging or laying off any of them as long as they continued to do good work. These employees discussed the matter among themselves, and three of them decided that they did not need the union, and each wrote a letter to the union rescinding, cancelling, and withdrawing his previous signed authorization card. Of the six employees in the Meat Department there remained only two authorization cards, and those were the two which were signed by Mrs. Gibbons and Mr. Stanley, originators of the union proposition.

The company is charged with wrongfully inducing the employees to cancel their authorization cards, and in doing so that it committed unfair labor practices in violation of the National Labor Relations Act. We will not here go into the specific charges, but will do so in the argument. The company had agreed to meet with the union on August 19, 1968. On being informed of these three cancellations on August 14th, Mr. Marshall then wrote a letter to the union stating that he was informed that the union did not represent a majority of the employees in the Meat Department, and therefore he would

not recognize the union and there would not be any reason for a meeting on August 19th. There were some other matters which occurred subsequently, and which are used for additional charges of unfair labor practices, but it is not necessary to go into detail about them at this point.

We will now state the procedure followed and how the formal issues originated. The basic question involved herein, and to be determined by this Court, is whether the findings of the Board with respect to questions of fact are supported by substantial evidence on the record considered as a whole as is provided and required in Section 10 (e) and (f) of the Act, 29 U. S. C. A., Section 160 (e) (f).

This action originated with a Complaint by the National Labor Relations Board (Certified Record, Appendix, page 168) against the Hy-Vee Food Stores, Inc., in which it is charged that Hy-Vee Food stores, Inc., at and in connection with its Kirksville, Missouri store, engaged in certain unfair labor practices as defined in the National Labor Relations Act, as amended (29 U. S. C. A., Section 151 et seq.). It is charged that the Amalgamated Meat Cutters and Butcher Workmen's AFL-CIO, Local Union 576 (hereinafter called "the union"), represented for collective bargaining purposes a majority of the employees in the Meat Department in the Kirksville store consisting of a total of six employees. The Complaint charges in Paragraph 7 thereof that on or about August 6, 1968 and at all times thereafter, Hy-Vee Food Stores, Inc., has refused to recognize the union and to meet and negotiate with it. It is further charged that Adam Marshall, the Kirksville store manager, and William Clemons, the company vice-president in charge of retail stores, threatened employees with economic and other reprisals for supporting the union, and promised employees economic benefits, to induce them not to support the union, and interrogated employees concerning their union activities, and by such

acts destroyed the union's majority. It is alleged that thereby Hy-Vee Food Stores, Inc. interfered with, restrained, and coerced employees in the exercise of their rights granted in Section 7 of the National Labor Relations Act, and has thereby engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (6) and Section 2 (7) of the Act. It is further charged in the complaint that the company has failed and refused to bargain collectively with the union and has thereby engaged in unfair labor practices within the meaning of Sections 8 (a) (5), 2 (6) and 2 (7) of the Act.

A hearing was held upon the Complaint before a Trial Examiner assigned by the Board, on November 19, 1968 in Kirksville, Missouri. After the hearing was called to order, counsel for the Board moved to amend the Complaint by adding thereto three additional charges. These amendments were permitted over the objection of the company for being late and untimely, having been made after the hearing began, and that it is unfair and a violation of the Rules of Procedure of the Board and of the Rules of Civil Procedure. Counsel for the Board then dictated the amendments into the record. The company had no opportunity to investigate these charges or to prepare responsive evidence. We cite this also to show what employers are confronted with in these cases.

The company filed an answer to the original Complaint (Certified Record, Appendix, pages 172-175) specifically denying the charges in the Complaint. After the hearing, the company with permission filed an answer to the amendments. Counsel for the Board failed to include our answer in the Appendix. We have set out that answer in the Appendix at the end of this Brief, as we did in our Circuit Court Brief.

The Trial Examiner filed his findings and recommended decisions with the Board (Certified Record, Appendix,

Page 3). The Trial Examiner's findings and recommended decision are not supported by the evidence. The language thereof distorts and misinterprets the testimony. Items of testimony are taken out of context in a vicious attempt to support the Trial Examiner's erroneous and unsupported findings and recommended decision. Exceptions were filed by the company with the Board to the Trial Examiner's findings and recommended decision, which exceptions were also omitted from the Appendix by counsel for the Board in the Court of Appeals. The Board made and filed its Decision and Order (Certified Record, Appendix, page 32) which accepts and affirms the Trial Examiner's findings and recommended decision and order. Said decision and order are not sustained by any evidence. The statement of the basic evidence relied upon is twisted and phrases are taken out of context, and is not a true and correct statement of the evidence, nor of its context and purport. It also recommends that the company be required to recognize and negotiate with the union as bargaining representative of the six employees in its Meat Department in the Kirksville store, notwithstanding that the union represents only two employees of said Meat Department.

On September 24, 1969, the Board filed its Supplemental Decision and Order. In this decision and order, the Board reaffirmed its previous order, but therein listed the alleged unlawful conduct by the company, which had not been done in the original decision and order.

The company emphatically denied that it was guilty of any unfair labor practices of any kind whatsoever. We have stated the bare basic facts involved and the procedures that were followed, and upon which the issues in this case were based. As stated, it will be necessary to discuss the evidence in detail in the argument to show that there was no substantial evidence on the record considered as a whole.

It will therefore be necessary for this Court to examine the evidence in order to determine whether the Circuit Court merely accepted the statement as to the evidence of the Trial Examiner and the conclusions thereon by the Board, and did not make a realistic examination and analysis of the evidence. The true record and evidence belie the statement of the evidence and the conclusions therefrom by the Trial Examiner and the Board. An examination of the true record of the evidence shows conclusively that there were no unfair labor practices committed by the company. It shows only that these employees were mistaken in their reasons for needing the union, and that all Mr. Marshall and Mr. Clemons did was to explain their error to them. They left it up to them to decide.

Of necessity, we therefore will be required to discuss much of the evidence in our argument.

IV

ARGUMENT

Preliminary Statement

The petitioner, Hy-Vee Food Stores, Inc., complains strongly of the mistaken and unfounded decision of the Circuit Court, which is based upon the unjustified and unsupported decision of the Board. The requirement is well stated in the National Labor Relations Act, 29 USCA, Section 160 (e) (f), that the findings of fact must be "supported by substantial evidence, on the record considered as a whole". Also the Circuit Court and the Board each failed to note and observe the provisions of Section 8 (c) of the Act, which provides as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

We have heretofore called attention to the fact that the primary complaints are that Mr. Marshall, the store manager, and Mr. Clemons, the vice-president of the company, talked to the employees in the Meat Department as to what their reason was for going to the union, and the employees upon being told them that it was for job security, and that they had fear of losing their jobs, because of the discharge of two employees in the grocery department. They went to the union thinking that the union could prevent their being discharged. It will be noted particularly, that Mr. Marshall, the store manager, and Mr. Clemons, the vice-president, just simply and

only told these employees that they were mistaken in their fears, that they were doing good work, and as long as they continued to do good work, there was no danger of any of them being discharged. That is the net of the conversations that we will hereinafter in detail point out. Under the provisions of Section 8 (c) of the Act as above set out, both Mr. Marshall and Mr. Clemons had a right to express their views and opinions upon this question, and they did so by only telling the employees that they were mistaken in their assumption. The quoted provision of law (Section 8 (c)) says that such statements are permitted and shall not constitute or be evidence of an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit." The Court should keep this basic and statutory legal principle constantly in mind.

It would extend this Petition for a Writ of Certiorari unduly if we discussed each item of evidence and testimony distorted and taken out of context by the Trial Examiner and the Board. We shall here review sufficient of the testimony of the five employees, and of Mr. Wolff, the union representative, Mr. Marshall the store manager, and Mr. Clemons, the company Vice-President, to show conclusively that the findings and decision of the Board, and accepted by the Circuit Court, are not "supported by substantial evidence on the record considered as a whole," as is required by the National Labor Relations Act. The testimony and evidence specifically referred to and set out herein show that no witness stated anything which could be legitimately considered an unfair labor practice by either Mr. Marshall or Mr. Clemons. We submit that the testimony of each witness as a whole and, in the obvious intended context, does not show or indicate any unfair labor act by either Mr. Marshall or Mr. Clemons. Also, the record we set out here considered as a whole is

definitive of the whole record and shows no unfair labor practice act.

We feel this method is sufficient to show this Court that this Petition of a Writ of Certiorari must be granted. After this Petition is granted, we will make a full and complete presentation.

Union Representative Invited Marshall to Talk to Employees

It will be noted, that Mr. Wolff specifically told Mr. Marshall on the morning of August 6, 1968, at the meeting at which he requested recognition, that the employees desired job security, and that is the principal reason that they went to the union, and Mr. Wolff then testified that he stated to Mr. Marshall: "The employees of the Meat Department were there in the store available if he was not convinced that these were their desires." Later he again said "they were available there in the store if he wanted to talk to them." (Certified Record, Appendix, page 154.) This was certainly an invitation to talk to the employees as to their reason for going to the union.

The Circuit Court did not discuss the testimony or mention the invitation by Wolff for Mr. Marshall to talk to these employees. We submit however, that under the provisions of Section 8 (c) of the Act above set out that Mr. Marshall and Mr. Clemons had a right to talk to them even without Wolff's invitation.

Conversations With Employees

After Mr. Wolff left, Mr. Marshall decided to talk to the employees to learn what their reasons were for seeking union assistance, in accordance with the suggestion by Mr. Wolff. In the afternoon of that same day, August

6, 1968, Mrs. Gibbons, meat wrapper, Mr. Stanley, a meat cutter, and Donald Harker, a 17 year old apprentice employee, were available and Mr. Marshall talked to them together. It should be remembered that Mrs. Gibbons and Mr. Stanley were the employees who solicited the union in the first place.

Marshall testified he told them that Mr. Wolff had given him a list of the complaints that the employees had given him. Mr. Marshall told them he had not been aware of them before. Mr. Marshall testified that he asked them if these complaints which Mr. Wolff had given him were the things that were bothering them. Mr. Marshall testified specifically as follows:

> "Q. What were the important things that they were complaining about? A. Job security was the thing they complained about.
>
> Q. Now, the job security proposition, what developed on that at this meeting? A. Well, like the other people have said, they had heard a rumor that there were about to be two or three people let out in the meat department and replaced by part-time help.
>
> Q. Do you recall what response you made? A. I said it looked like if they had done any thinking at all they would have realized that part-time help can't take the place of skilled laborers.
>
> Q. You called them skilled laborers? A. Yes, they are skilled laborers, my estimation of being skilled.
>
> Q. Now, these people that were laid off, what department were they in? A. They were both in the grocery department" (Appendix, pp. 146-147).

Mr. Marshall testified that the reason the grocery employees were laid off was that they had too many full time employees, and that the work of these two men was not satisfactory. After some discussion back and forth

and the conversation was over, Mr. Marshall testified that neither Marge Gibbons nor Gary Stanley changed their position, and they said they would prefer to go on with the union and have a contract to work by. Don Harker, the seventeen year old, said nothing. (Certified Record, Appendix, page 150.) It is apparent that the meeting had no effect upon changing Mrs. Gibbons or Stanley, so from the union standpoint there was no harm done.

In this connection, we submit it would be well to consider the testimony of these three employees. Remember the statute says the Board's decision must be supported by "substantial evidence on the record considered as a whole."

Employee Marjorie Gibbons

As heretofore stated, Marjorie Smith Gibbons was the one who started the union affair. She testified as to her having concern about the possibility that employees in the Meat Department might be discharged, and about her enlisting the aid of Mr. Wolff, the union representative.

One of the charges is that Mr. Smock, the Meat Department Superintendent, was present at the meeting on Tuesday afternoon, August 6, and it is charged that he violated the law by proposing that they bypass the union and have only a company contract. This was not suggested by Smock as a formal proposal by him. Mrs. Gibbons testified as to some of her complaints about company policies, and she testified that she would like to have a contract so that they could know what their specific rights were. She testified as follows:

Employee Gary Stanley

Mr. Stanley, one of the employees who did not cancel his authorization card, testified upon the same incident. However, after reciting that Mr. Wolff had told Mr. Mar-

shall about the problems and had given him a list of them, Mr. Stanley testified that "well, *I can't remember all of it, exactly in so many words,* but it was either Adam or Charles Smock, he is the Meat Supervisor for Hy-Vee, asked if he couldn't go around the union, he didn't like the idea of the union at all and he didn't like to go through a third party." This shows clearly that Stanley was merely reciting an impression because he couldn't remember what was said "exactly in so many words." Marjorie Gibbons could remember because she was the one directly engaged in that conversation. So, in all fairness, it would be logical to take Marjorie Gibbons' version over the loose statement by Stanley. But not so with the Trial Examiner and the Board. They took and built up the loose version of Stanley. Even so we submit that there is nothing in the Stanley version which violates Section 8 (c) of the Act above set out. There is no threat of any kind in the Stanley version. In any event this incident did not affect either Marjorie Gibbons or Stanley. They both stated that they preferred to stay with the union and to have a union contract. Also, they were the only two who did not cancel the union authorization cards. That in and of itself is proof that there was nothing threatening in the statement.

Further Stanley was asked if Marshall had said something to him that three of the boys would not have any future if they had a contract with the union. Stanley was then asked "don't you recall that the statement was made that the union contract would tie you down and that was the reason?" Stanley answered "Yes, he meant that" (Certified Record Appendix, page 107).

Yet the Trial Examiner and the Board distort this discussion about seniority under the union contract and about the fact that the contract would apply only in the Meat Department where there were no jobs to be advanced into. The only job ahead of Stanley was the supervisor of the Meat Market. Obviously that is a supervisory job which

is not covered by the National Labor Relations Act and would therefore not be covered by a union contract. Marshall merely called the fact to the attention of these employees that under the union contract submitted, the Green Hills Contract, the seniority provision there would hold them down. Note that Stanley says that is what Marshall meant. Obviously this is not a threat but a comment upon the proposed union contract proposed by the union and the seniority provision thereof. Yet the Trial Examiner and the Board read into that a specific threat. Stanley didn't so understand it, and we submit the language does not imply any such a thing.

Stanley was questioned further about a conversation he had with Mr. Clemons, the company Vice-President, on Thursday, August 8, 1968. Stanley stated to Clemons that the reason he went to the union was because there were employees laid off in the store, "and there was a rumor that we could have been possibly laid off or were going to be, so we wanted the union" (Certified Record Appendix, page 103). He further testified that Clemons did not ask him if he had signed an authorization card, and that Clemons did not "pursue him to any point of view about the union." He was then questioned by Board Counsel and he answered, as follows:

> Q. What did he (Clemons) say to you in this conversation, if anything, pertaining to the union?
>
> A. "He just asked me to search my soul and think it over. I had thought it over and I said I was for the union". (Certified Record Appendix page 103).

Further, on his cross-examination Stanley repeated that his concern was his fear of being laid off. Stanley testified:

> Q. What were the problems at that time that you told him (Marshall) about?
>
> A. "My big problem was being laid off, and I couldn't afford to be laid off" (Certified Record Appendix page 105).

Mrs. Gibbons testified as Employee Marjorie Gibbons to her conversation with Mr. Clemons. She testified they talked about some insurance questions and problems which had nothing whatever to do with the union. She said that Clemons was apologetic and made the remark—"our face is red, we are embarrassed, we in the company have let you down. Why didn't you come to us before you went to the union? What makes you feel you need a union?" She testified that she then gave him the reasons, she thought that they needed a union. She explained in detail the rumor as to lay offs and cutting work time and the discharge of the two men in the Grocery Department. She said that all Clemons said in his conversation with her was to apologize for not being on the job with them and being alert to their thinking. Surely this is not a threat of any kind or character. She testified further that there was no pressure of any kind put on her about the union, as follows:

> Q. "He didn't tell you that you had to get out of the union?
>
> A. No, sir, he never told me I had to do anything
> * * *
>
> Q. Wasn't his conversation along the line that you could do what you pleased, but he couldn't understand why?
>
> A. No, sir, it wasn't even discussed that deeply as to the union. Most of the conversation was that they were embarrassed, and their face was red, they had let me down, why didn't I come to them first" (Certified Record Appendix page 130).

We have just reviewed the testimony by the two proponents of the union. They did not cancel their authorization cards. They were the ones most in favor of the union. Yet they were treated courteously, and they themselves said that they were not threatened. Surely no sane person could twist a threat out of this testimony.

Employee Don Harker

Don Harker was a third employee with whom conversations were had. Remember that Don Harker was a 17 year old boy who was an apprentice, and was not a meat cutter. He had a brother named Joe Harker who was a meat cutter in the Meat Department. Don had signed a union authorization card and had given it to Mr. Wolff, the union representative.

Don Harker testified that he was in the meeting with Mr. Marshall on the afternoon of August 6, 1968 at which Marjorie Gibbons and Stanley were present. Don Harker testified that Marshall had a paper with things written on it that he said Mr. Wolff had told him were the things that the employees were concerned about. He testified that Stanley and Mrs. Gibbons did most of the talking and answered most of the questions.

One of the charges is that Don Harker was threatened with discharge by Mr. Marshall at this meeting, and this is one of the items stressed by the Trial Examiner and the Board. This again is ridiculous and silly. It will be recalled that Mr. Wolff testified that he gave Marshall a copy of the Green Hills Store Contract as a proposal for Hy-Vee at their meeting on the morning of August 6, 1968, when Wolff made his request for recognition. It will be remembered that Mr. Wolff testified that Mr. Marshall took the time to go through that contract and ask questions. So the contract was fresh and uppermost in Marshall's mind as the meeting broke up on that afternoon of August 6, 1968. The whole Green Hills Supermarket Contract is in evidence as Exhibit "7". Article III on Wages, paragraph C states:

> "Apprentice Meat Cutters after two (2) years shall be classified as a Journeyman Meat Cutter and receive the Journeyman Meat Cutter's scale. *All apprentice*

meat cutters must be at least eighteen (18) years of age" (Italics ours) (Certified Record, Appendix, page 180).

The desperation of the Trial Examiner and of the Board in pinning this alleged charge against Hy-Vee is demonstrated here. There is no question but that if the Green Hills Contract were negotiated and agreed to by Hy-Vee, seventeen year old Don Harker, on account of this provision, could not be employed. All Mr. Marshall did having read this contract and note this provision that morning, was to merely inform Don Harker relative thereto, and that the union was proposing a contract which would bar Don Harker's being hired. Obviously, this is not a threat, but is only a statement of what the union was proposing. Yet the Trial Examiner and the Board call it a threat. Don's language is inept, but on the record as a whole, there can be no question as to what Marshall was talking about.

Don Harker testified that Marshall talked to him and that Clemons was present on Thursday, August 8, 1968. He testified that Marshall asked him his reason for signing the card and Donald Harker replied that "he heard that they were going to lay off three men by September 1 and I thought we needed more security than we had." He testified that "Marshall came right back and said he thought the people in the Meat Department had more security than we thought. He asked me what my future plans are, and he said, 'do you know the union won't help you in anything but the Meat Department?' And I never answered him. And he asked me if I planned to stay in the meat department and I said, 'Yes, as far as I know.' And Bill asked me if I thought this was what I wanted, if I thought I would get along with it and I said, 'Yes, I think I can.' And Adam said, 'I think we have been close enough friends that I figured at least you would

come to me when you needed help." And this concluded the meeting" (Certified Record, App. pp. 98-99).

Thus it will be observed that Mr. Marshall again was referring to the fact that the proposed Green Hills Contract had a seniority provision in it and that it applied only to the Meat Department composed of six employees. This was purely an informative statement and cannot be considered to be a threat in any way.

It is charged that Mr. Marshall attempted to influence Don Harker's testimony in the hearing before a hearing officer. It is charged that Mr. Marshall about two weeks before the hearing met Don Harker and suggested to him that if he wanted to, he would like to have either him, Chuck Baker, or Joe Harker, to stand up in the Trial and ask for an election. Don Harker testified that he could not do it (Certified Record, Appendix, p. 100).

This is obviously a misunderstanding by Don because the company had back in August filed a petition with the Regional Director for an election and it was pending. There would be no object or purpose in Mr. Marshall's asking the 17 year old Don Harker to get up in the formal hearing and ask for an election. In any event if there was any such conversation it did not imply a threat or a promise, and it was de minimis.

Further, it is charged that Mr. Marshall tried to influence Don Harker's testimony, because it is claimed that in passing Don in the store one day shortly before the hearing, Mr. Marshall merely asked Don if he was ready to testify, and Don answered that he was. Don testified that Mr. Marshall then said that "he was there to back us all the way." That was built up as though it were a deliberate and planned attempt to influence Don. The hearing was approaching, and naturally people in the store including Marshall were thinking about it. This remark by Mr. Marshall when considered on the record

pertaining to it as a whole, was just a passing pleasantry, and harmless conversation.

It is ridiculous to read into such alleged passing remarks that this was a deliberate attempt to influence testimony. Nowhere is there any testimony that Mr. Marshall told Don or anyone else to say anything on the hearing other than the truth.

Furthermore, the question as to pressing these employees to get out of the union is stressed in the charges. These employees were told that it was up to them as to whether or not they had a union as their representative, but to just think it over carefully.

As to Donald Harker, counsel for the Board in the Court of Appeals prepared the Appendix containing the evidence. Important and material cross-examination of Don Harker was omitted therefrom. We set out that cross-examination in an addendum to our brief in the Court of Appeals. We likewise have set that cross-examination out in the Appendix attached to this brief. A pertinent part thereof is as follows:

> "Q. Now, did Mr. Clemons or Mr. Marshall tell you that you had a right to belong to the Union if you wanted to? A. Yes, sir.
>
> Q. They said that was your own business? A. Yes.
>
> Q. And you understood that you could? A. Yes.
>
> Q. Do you know of anything that could be called a threat that either of them made to you?
>
> Mr. Broun: Objection, conclusion.
>
> Trial Examiner: Sustained" (Attached Appendix).

Such evidence as that just quoted, and particularly by a seventeen-year old indicates clearly that there was no pressure or threat of any kind. Yet the Trial Examiner and the Board went out of their way to read into the

conversation ulterior purposes. We submit that there is nothing in the testimony of Donald Harker when the context thereof is read which is an unfair labor practice by either Mr. Marshall or Mr. Clemons.

Employee Joe Harker

Joe Harker, an employee and currently a meat cutter in the Meat Department, also signed a union representation card, and cancelled it on August 13, 1968. He attended the union meetings with Mr. Wolff, the union representative.

Joe Harker testified that on Thursday, August 8, Mr. Clemons talked with him in a back room of the store. He said that Mr. Clemons inquired about his reasons for going to the union? The following conversation occurred:

> "I said, 'Well, we have heard this rumor that they are going to lay off some of the full time meat cutters and hire men to come in at a cheaper rate of pay and do the same work we are doing.' And I said the Union gave me a sense of security. I wasn't going to give up my job. 'I have a wife and family to take care of. I am not giving up my job to somebody for a lower rate of pay.'
>
> Q. Did he make any other comment? A. 'Well', he said; 'What makes you think you will be laid off?' And I said, 'Well, you have terminated two other people, and if it can happen to them why can't it happen to me?'
>
> Q. Did that conclude the conversation? A. No, it didn't. He said, 'That is a little different.' He said, 'Those people weren't doing their job up to specification and they just weren't needed any longer.' And I said, 'Well, if it can happen to them why can't it happen to me?' And he said, 'What makes you think

that they would fire you? Have you had anything to lead you to believe you would be fired?' And I said, 'No', I said, 'In fact, Adam just had got through bragging on us, how good a job we were doing.' But I said, 'one of the guys they had fired had been bragged on.' And I said, 'If it did happen to him why can't it happen to me?'

Q. And then was anything else said? A. Well, he asked me about my family and asked me about how things were going at the market and everything. When we got ready to leave he said, 'Joe, I wish you would search your soul and think this thing out thoroughly'." (Certified Record, App. pp. 81-82).

This obviously was a friendly discussion and there was nothing improper said. Joe Harker testified that in the forepart of September, 1968, he again had a visit with Mr. Clemons in the back room, and that they talked generally about the store, but that nothing was said about the union. This, as a part of the "record as a whole" shows that there was no concerted effort to unduly influence these employees. Joe Harker testified also that he talked to Mr. Marshall on Friday, August 9 in the coffee room of the store. Mr. Marshall there asked him the reasons why he joined the union, and he testified that he told Mr. Marshall the same thing that he had told Mr. Clemons on August 8, which testimony is above set out. Joe stated that Mr. Marshall said that this might have some bearing upon promotions and advancements and that they talked just a few minutes. Again we call attention to the fact that the proposed union contract, the Green Hills Contract, provides promotions by seniority, and obviously Marshall was referring to the fact that promotions would have to be made in accordance with that provision if that contract were agreed to. There was no threat of any kind involved, but a mere calling attention to the fact that the proposed contract would

govern and that it would apply only to this small Meat Market unit of six employees. Instead of picking out a bit of testimony like this and isolating it, the Board and the Circuit Court were required by the law to consider whether each of the charges were "supported by substantial evidence on the record considered as a whole." The question of the proposed union contract and the fact that only the small meat department in the Kirksville store would be subject to the contract was an important item of information. To call attention to it is not a threat.

Joe had other conversations with Mr. Clemons and Mr. Marshall later, and those conversations were about the operation of the Meat Department and not about the union. Nothing was said about the union. This was long after Joe had rescinded the union authorization card on August 13 and after Marshall had written his letter to the union on August 14 refusing to recognize the union. This situation shows clearly that there was no vicious program being followed by Mr. Marshall and Mr. Clemons.

It is charged that Joe Harker was given a wage increase in the latter part of October, 1968. He had been given a raise from $2.56 to $3.00 an hour. The raise had been promised him on the 18th or 19th of December, 1967. He was told by Marshall that the next raise would be in the fall. Joe testified as follows:

> "Q. So that you did have a definite commitment from that you would be given another raise in the fall? A. Yes, but not an exact date.
>
> Q. And you were expecting it, were you, in the fall? A. Right. I didn't know when." (Certified Record, Appendix, page 86.)

The rule of law is well settled that no benefits can be given during a union organizational program, except that anything which had been definitely promised prior to the

commencement of the union program could be given regardless. We will discuss this further and amplify this situation more in our discussion of the conversations with employee Chuck Baker, who was also given a raise under the same circumstances. We adopt that argument as being applicable there also.

Joe Harker testified that he was told that he had a right to have the union, as follows:

> "Q. Now, you said you had this visit with Mr. Clemons on two different occasions. Did he say anything about whether or not you had a right to belong to the Union, to have the Union represent you? A. He said I had a right to have the union represent me.
>
> Q. And he didn't tell you you had to get out or anything of that sort? A. Right.
>
> Q. He left it up to you? A. He left it entirely up to me.
>
> Q. Was it his inquiry if you had any complaints why didn't you come to management and talk to management about it? A. He did, he made that comment. * * *
>
> Q. Was anything said to you that he used any threats of any kind or any strong language that you should get out of the Union? A. No, he did not.
>
> Q. As I understand it he, in visiting with you about it, emphasized that it is up to you to do whatever you please? A. He did. He told me to think it over and search my soul, make sure I was doing the right thing" (Certified Record, App. pp. 88-89).

Thus another employee, Joe Harker, was told that it was up to him as to whether he wanted to have the union, and that he had a right to have the union representative. It is obvious that Mr. Clemons was being very sure that they understood they had this legal right.

It is charged by the Board that Joe Harker was threatened, that he would not receive promotions in the Meat Department. Joe testified relative thereto as follows:

"Q. Now, Joe, what is your job in the meat department? A. I am a meatcutter.

Q. And what other advancement is there in the department beyond meatcutter that is available outside of the head meatcutter or manager of the department? * * * A. Head meatcutter or supervisor.

Q. That would be the only job ahead of you now? A. Unless I wanted to branch out and go back into the grocery department and be a store manager.

Q. There wasn't anything said about being a full manager, was there, or going back in the grocery department? A. No.

Q. So, then, the only thing in the meat department would be the head man or the fellow who sort of directs the department, is that right. A. There is a meat supervisor over the store.

Q. Not in your department, but over the store? A. Over the market" (Certified Record, App. pp. 89-91).

There was no threat here.

Joe Harker further testified as to what Mr. Marshall and Mr. Clemons said relative to possible lay-offs in the Meat Department as follows:

"Q. What did they say about layoffs in the meat department? A. He said we were doing a fine job and there was no sense in worrying about the job as long as we kept up the work.

Q. (By Mr. Garrett) Did that satisfy you?

Mr. Kimbrough: I object, Your Honor.

Trial Examiner: Sustained.

Q. (By Mr. Garrett) Then, I take it from what you

just said in your last answer that in these visits talking with Mr. Marshall, and Mr. Clemons, that their attitude was at least friendly?

Trial Examiner: Was their attitude friendly?

The Witness: It was towards me, yes" (Certified Record, App. p. 92).

Naturally, when Joe Harker and the others understood that there was no danger of them losing their jobs as long as they continued to do satisfactory work, and they knew there was no need to have the union for the purpose of preserving their job security. They discovered that they already had job security. The Board takes the position that because these employees mistakenly thought they needed the union for job security and signed the Authorization cards, it was an unfair labor practice by Mr. Marshall and Mr. Clemons to tell them that they were mistaken and that they had job security. We submit that they had the right to tell these employees the truth as long as there was no violation of the requirements of Section 8 (c) of the Act. We submit that there were no violations when this record is considered as a whole.

As to Joe Harker, the record shows clearly that he voluntarily cancelled his union authorization card when he learned the truth about his job security. The mere fact that he cancelled it does not imply that Mr. Marshall and Mr. Clemons wrongfully threatened him.

Employee Charles Baker

Chuck Baker, also known as Charles Baker, was a witness on behalf of the Board. He had been employed at the Kirksville Hy-Vee store for approximately one year and five months, and is now a meat cutter. He was familiar with the union campaign.

Baker testified that he had talked with Mr. Clemons on August 8 in the stockroom. Baker testified as follows:

"He asked what my gripe was and I said I didn't think my wages were quite up to par and I told him that Adam promised me a raise previous to my coming to the meat department, I had not got it yet, and he said, 'Yes, we have made a mistake there. We have fired managers for less than this.' We just discussed how well we got along in the meat department, about the machinery, as best as I remember. And he asked me, 'Have you given any thought to an election.' And I said, 'No, I have signed the card,' and that is the way it ended.

Q. Did you have a later conversation with Mr. Clemons? Directing your attention to the Monday following that time of the week, which would be somewhere, probably Monday, about the 12th of August. A. Yes. He came down from Chariton about * * *. And we went to the back room individually and talked to Bill, and it was about the same conversation between he and I as the first.

Q. You say about the same conversation. What subjects were testified to? A. About the raises I had not got and the new machinery and if I was satisfied, and things like that.

Q. Were you asked again about union affiliation? A. Not that I remember" (Certified Record, App. pp. 110-111).

Thus, it will be observed that this conversation took place a long time before the three employees had cancelled their Authorization cards, and nothing was mentioned about the union. Baker testified further relative to the promised raise:

"Q. Directing your attention toward the last of September of this year, did you have a conversation with Mr. Clemons and Mr. Marshall about the raise? A. Yes. We were in the back room of Hy-Vee. And

> I asked Ted Wolff prior to this meeting if I was eligible for this raise, * * * and he said, 'Certainly, anything you were promised or that you were due prior to the union deal, by all means you have it coming. I don't want to know if you do get it; I want to know if you don't get it.'"

Further, at the last of September, Mr. Baker had a talk with Mr. Clemons and Mr. Marshall, in which Baker told them what Wolff had said about his being entitled to the raise. Baker said:

> "Yes, Mr. Clemons said I believe you are right," and Adam said, "I was ignorant of the fact. I didn't know." * * * "I was under the impression that as long as this was going on I wasn't to give any raises." And Bill said: "As long as they are due and as long as we go through the union, what we are doing is perfectly all right".

Further, Mr. Baker was examined relative to his withdrawal letter of his union authorization card. The following occurred:

> "Trial Examiner: Had you sent the company a copy of your withdrawal letter?
>
> A. No, I did not send it to the company, I sent it to the union.
>
> Q. (By Mr. Broun) Let's explore that very briefly. Would you please relate the circumstances surrounding your sending in the withdrawal notice to the union? Please describe that for us. A. What do you mean?
>
> Q. Where were you at the time, who was around? A. When I sent it in?
>
> Q. Yes. A. One morning I went to work and Garry, Joe, and I was present. I said, 'Here is my letter of withdrawal, Garry.' We had discussed it before

if I wanted to take it up to Adam and have them stamp it and mail it for me. I asked Adam if he had a stamp and he said he did, I said, 'This is my letter of withdrawal, will you mail it for me?' And he said, 'I sure will'" (Certified Record, App. pp. 114-117).

Mr. Baker was given his raise in the latter part of October, 1968 making his hourly rate $3.00, the journeyman meat cutter's rate. (Certified Record, Appendix, page 122.)

It will be observed in the reading of Mr. Baker's testimony that his principal problem was that he had been promised a raise in wages and had not been paid. Marshall thought he could not give him the raise while the union organizational program was on. Note that this raise was given long after Baker had sent his letter to the union rescinding his Authorization card, and long after the letter of Marshall to the union refusing to recognize or to bargain with the union. Both of these letters were sent to the union on August 14, 1968.

There can be no question about the propriety of the payment of this increase of wages under the true record and facts herein. There was no bribe.

We have set out the basic context of the testimony pertinent to the issues given by the five employees who originally signed union cards. We submit that none of them testified to any item of any kind which could be considered an unfair labor practice on the part of Mr. Marshall or Mr. Clemons. As stated, the Trial Examiner distorted and misstated the true evidence and statements of these employees, and the Board as well as the Court of Appeals obviously did not bother to check or verify the true record. If they had, they could not have arrived at a decision which accepted and affirmed the distorting and misstatements of the Trial Examiner.

Vice-President Wilson B. Clemons

Mr. Clemons testified relative to the nature of the store and its operations. He testified relative to the union situation, and stated that he talked to the employees in the Meat Department. He stated his position and approach in talking to them, as follows:

> "I told them, my opening remark to every one of these employees when I first came down here, when Adam called me and said the people were interested in the union, and Mr. Wolff was in and talked to him, and I think it was on a Thursday, and I told every one of those employees it was their privilege to join a union if they wanted to, it was up to them. * * * I was surprised that we had a problem, as I think was pointed out, the people felt the need for a union and I should have found out about it before they went to someone else with it, but that was their privilege. They can do that, but I would have appreciated it if we had known about it. Now we know about it, but we want to discuss it. But they can sign cards, and I didn't ask one employee if they had signed a card. We have the right to negotiate with the union. That is up to them."

Mr. Clemons testified relative to employee Baker's conversations with him about a wage increase. Mr. Clemons testified as follows:

> "Chuck Baker said that Adam had promised him a raise last December or in January that he would get a raise this fall, probably in October or November, and I said, 'If Adam promised you a raise, I don't know what we can do about it now, because of the union activity I don't know for sure, I will have to find out.' So the next time I was down, he said, 'I talked to Ted Wolff (union representative) and Ted said, If they promised you a raise there is no reason why you can't have it.' "

Mr. Clemons talked to Mr. Garrett, his attorney, about it and Mr. Clemons testified that Mr. Garrett told him that if Marshall had promised an employee a raise before the union activity, it was alright to pay it to him. Mr. Clemons testified that from his own knowledge each of these two employees who had been promised wage increases prior to the union activity were then paid (Certified Record, Appendix, pp. 133-135).

Mr. Clemons was then questioned as to the charges that he had intimidated and coerced employees because of their union activity. He testified as follows:

> "Q. (By Mr. Garrett) There has been a charge that the employees have been intimidated and coerced in connection with their union activity, and threats against them and promises of benefits have been made. Do you know of anything of that sort in connection with this Kirksville situation? A. No, sir, I have not threatened any employee in any manner at all, and have not promised any benefits.
>
> Q. Have you held out any promises of reward or promotions or anything of that sort? A. No, sir.
>
> Q. And if anybody said anything to the contrary, if anybody says you have, what do you say? A. I say I haven't, absolutely, positively no."

Thus it will be observed what Mr. Clemons said was in accord with what each of the employees said about their conversations with him. This we submit is the true record. There can be no question but that there was no unfair labor practices committed.

We have perhaps unduly extended this review and discussion of the evidence and the facts, but we feel it is necessary to show to the Court that both the Circuit Court of Appeals and the Labor Board did not give this case adequate and the required consideration. We realize both are

overwhelmed with work and are busy, but employers and business enterprises are entitled to fair treatment and protection under the law, and particularly in this case.

LEGAL PROPOSITIONS

Preliminary Statement

Hy-Vee Food Stores, Inc., the Petitioner herein, respectfully requests this Court of last resort to grant the Petition for a Writ of Certiorari. Serious and important basic principles have been violated by the National Labor Relations Board in this case. We regret that the Circuit Court obviously working under pressure from a considerable volume of business, did not have the time to go over the extensive record in this case that is required.

As heretofore stated the basic rule of law involved is that the findings of fact by the Board must be supported "by substantial evidence on the record considered as a whole." This necessarily involves a consideration of that record. There is 198 typewritten pages of evidence. It will be noted that the Appendix in the Certified Record herein consists of 190 printed pages. Therefore, in order to properly present the background situation in the evidence and record it is necessary to quote extensively from that record. We apologize for the length hereof, but don't see how it can be avoided. This is particularly true since we apparently failed to adequately present this matter to the United States Court of Appeals for the Eighth Circuit.

The Petitioner, Hy-Vee Food Stores, Inc., insists strongly that the Trial Examiner in his report, findings, and recommended order misstated, distorted, and misinterpreted the testimony of the employees and the evidence so as to sustain his erroneous findings. Petitioner herein filed specific and detailed exceptions with the National

Labor Relations Board, but the Board apparently ignored them and by a short formal decision abstractly accepted the findings and recommendations of the Trial Examiner, and obviously did not give careful consideration to or review the evidence. The Board thereafter apparently realized the inadequacy of its first decision and filed a supplemental decision in which it attempted to itemize the alleged misconduct by Mr. Marshall, the Store Manager, and by Mr. Clemons, the Vice-President of the company. Each is an expression of an assumption and inference without any recital of evidence anywhere in the decision, and we submit is a gross misstatement of the true facts, evidence and record. There is absolutely no support therefore in the record.

The Statute requires that the findings of fact by the Board must be "supported by substantial evidence on the record considered as a whole" (Section 10 (e) (f) of the Act). It is also provided in the Act that the decisions of the Board shall be subject to review by the United States Court of Appeals, and by the Supreme Court of the United States upon writ of certiorari (Section 10 (e) of the Act).

Therefore we submit that our petition for a writ of certiorari must be granted, and this matter carefully reviewed by this Court on final submission. It was necessary for us to set out a considerable part of the evidence because of the necessity of showing that the decision of the Court of Appeals is not sustained by substantial evidence on the record considered as a whole, and that the Court erred in rendering its Per Curiam Decision.

The Court of Appeals in its two page Per Curiam decision states:

> "In our view, three basic questions are presented: (a) whether there is substantial evidence on the whole record within the teachings of the Supreme Court in

Universal Camera v. N. L. R. B., 340 U. S. 474 (1951) to support the Board's findings of § 8 (a) (1) and (5) violations; (b) whether the order requiring the company to bargain with the Union is appropriate under the circumstances of this case; (c) whether the Board's unit determination is proper."

The decision then states that pursuant to the admonition of the Supreme Court in the Universal Camera case, the Court has canvassed the whole record and "are left with the firm conviction that the Board's findings are supported by substantial evidence, and that therefore the Court denies the petition for a review. There is no analysis of any kind of the evidence in the decision. We cannot understand how the Court could have "canvassed the whole record" and not be convinced that the Board's findings and decision are totally erroneous. In that Court as here it was necessary to set out much of the evidence in detail because of the requirements of the law that the findings of the Board must be supported by substantial evidence on the record as a whole. We hope this Court will give this case the consideration it deserves.

The Board in too many cases and particularly this one, assumes that when a majority of the employees once designate a union as their bargaining representative, there can be no change therein, for at least a year. This is not in accordance with the spirit and language of Section 7 of the Act. That Section provides that

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*
> * * *

Three of the five employees who filed the authorization cards, when they realized that they had jumped to a conclusion and that there was no danger of them loosing their jobs, on their own and without suggestion from any company representative, each wrote a letter to the union cancelling, rescinding, and withdrawing their authorization cards. The effect of the Board's decision, and the decision of the Court of Appeals, is to deny these employees in the unit the right to rescind their action and to not have the union represent them. In this case there had been no meeting to negotiate a contract, although Mr. Marshall had agreed to meet on August 19, 1968, and there had been no negotiations of any kind. Surely, under these circumstances the employees had a right upon finding that they had made a mistake, to revoke their authorization cards. We realize that if there were unfair labor practices committed which wrongfully induced the employees to withdraw from the union, a different question is presented. We have at length in a prior division hereof pointed out the innocent and legitimate conversation which occurred between the employees and Mr. Marshall and Mr. Clemons. We submit that there is nothing improper therein, and that Mr. Clemons and Mr. Marshall specifically informed the employees several times that they had a legal right to have the union if that was their desire, but to think it over carefully and be sure that was what they wanted. So we submit that the provisions of Section 7 of the Act affirmatively authorize employees to refrain from any and all union activity, as provided in Section 7, and that Mr. Marshall and Mr. Clemons had the right to express their feelings under the authority of and within the provision of Section 8 (c) of the Act. These legal provisions have significance and have been too lightly considered by the Board.

The Courts Must Carefully Examine the Evidence and Record

This Court has the primary duty to examine this evidence and record to determine whether there is substantial evidence on the record considered as a whole to warrant the findings and decision of the Board and of the Circuit Court.

The Circuit Court in its Per Curiam opinion cites Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474, 95 L. Ed. 456. The Court of Appeals has not carefully read and applied the directions and rules of the Universal Camera case. We call particular attention to what the Supreme Court there stated:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" (p. 488).

We believe it will be helpful to quote the rules of action outlined by the Supreme Court to be applied by Courts, in the Universal Camera Case, as follows:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence ap-

pear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses for its informed judgment on matters within its special competence or both."

Although the Court of Appeals refers in its decision to the Universal Camera v. National Labor Relations Board Case and states that it lays down the rules to be followed, yet nevertheless the Court in this case could not have followed the admonitions of the Universal Camera Case and many of its own prior decisions upon this subject, and have denied our Petition for Review of the Board's decision and order.

The Eighth Circuit Court of Appeals has in several cases strongly stated the rules for which we contend, but it failed to observe or follow them in this case.

In Farmers Co-Operative Company v. National Labor Relations Board, 28 F. 2d 296, the same principles were involved as in the case at bar. There, as here, the Trial Examiner arbitrarily made fact findings which the Board accepted and which the Eighth Circuit Court of Appeals found were contrary to the evidence, and reversed the decision of the Board. In the Farmers Co-Operative Co. case the Circuit Court stated clearly our position in the case at bar. It said:

"Since the Board adopted the findings and recommendations of the Trial Examiner, the only question for determination is whether the findings of fact are 'supported by substantial *evidence on the record, con-*

sidered as a whole.' 29 U. S. C. A., Sec. 160(e) (italics supplied). Because that test must be applied, we have summarized all the pertinent evidence. As pointed out in the Universal Camera Corporation case, supra, the evidence contradicting the testimony relied upon by the Board must be considered by the Court on review. The Trial Examiner reached his conclusion by not crediting the testimony of any of the witnesses for the petitioner whose testimony was inconsistent with his own conclusion."

The Eighth Circuit Court stated the applicable rules in United Packing House Workers of America v. National Labor Relations Board, 210 F. 2d 325, 330, as follows:

"Since the decision of the Supreme Court in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456, it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence and if it is our duty to consider it then we must pass upon its weight."

The Eighth Circuit Court of Appeals also in Osceola County Co-Operative Creamery Association v. National Labor Relations Board, 215 F. 2d 62, stated the duty of the Court under Section 10 (e) of the Act pertaining to the scope of review of the Board's order. The Court there quoted from another of its decisions the following:

"The rule with reference to the review of findings of the Board is now, we believe, established by what is said by the Supreme Court in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 71 S. Ct. 456, 464, 95 L. Ed. 456. It is our duty to consider not only the evidence tending to support the Board's findings but also the evidence conflicting therewith. * * *"

The Eighth Circuit Court of Appeals in Fort Smith Broadcasting Company v. National Labor Relations Board,

341 F. 2d 874, had to consider similar questions to those in our case. There the Court stated:

> "The Company challenges the substantiality of the evidence supporting the Examiner's findings, making it incumbent upon us to review the record as a whole in determining the reasonableness and fairness of the adopting decision by the Board, 29 U. S. C. A., § 160 (e)" (citing cases).

The Board seems to consider that the mere fact that an employer personally would prefer not to have a union, that attitude affords a basis for findings by the Board, that anything the employer says or does on the subject is an unfair labor practice.

The Eighth Circuit Court of Appeals has in a number of prior cases plainly defined these matters. In Fort Smith Broadcasting Company v. National Labor Relations Board, supra, cited the anti-union attitude of the manager was the basis for his conviction by the Board. There the manager had stated to an employee who had been a personal friend that the fact the employee had signed up with the union would interfere with their friendship. The Board concluded and inferred that this statement was coercion tantamount to a threat of job reprisal, which resulted in the employee withdrawing from the union. This is another example of the strained use of adjectives by the Board and its Trial Examiners which are inappropriate and not justified by the circumstances. The Eighth Circuit Court stated that such "is not within the ambit of illegal conduct which Congress intended to proscribe in Section 8 (a) (1)." The Court there said:

> "The mere display of antiunion or anticompany hostility during the course of an organization campaign is to be expected and not regarded as an unfair labor practice." (citing authority.)

Also in the Fort Smith case an employee who had signed a union card talked with the company manager about it and then withdrew from the union. The manager never suggested that he withdraw, he just expressed his opinion about the union. The Court there found that there was no unlawful act or coercion. The Court concluded its decision by stating:

> "We find that the evidence on the whole indicates that the employer acted in the good faith belief that the Union lacked majority representation when it promptly declined recognition and, therefore, it was warranted in refusing to bargain with the Union until its claim has been resolved by a Board conducted election."

It is obvious from a reading of the Trial Examiner's findings and recommended decision, and from a reading of the Board's supplemental decision, that because these employees at Hy-Vee rescinded their prior authorization of the union, it was assumed that the employer must have been guilty of misconduct and unfair labor practices. It is obvious in this case, as it is in too many decisions of the Board, that an employer must accept unionization, and if he objects and discusses the matter with his employees, the employer automatically becomes a criminal and a violator of the law in the eyes of the Board, even though he does nothing which violates the limitations in Section 8 (c) of the Act, the freedom of speech provision.

In this same connection, we call attention to the Beaver Valley Canning Company case by the Eighth Circuit Court, 332 F. 2d 429. The following is a statement by the Court in its opinion:

> "An employer's general hostility to unions, without more, does not supply an unlawful motive as to a specific discharge" (Citing a number of cases).

Further in the Beaver Valley case the Court stated that:

> "Isolated interrogation, free of coercive statements and absent resort to systematic intimidation, is not unlawful conduct per se" (citing authorities).

It is obvious that Mr. Marshall and Mr. Clemons would rather not have the union come into the Meat Department. As is stated in the record and developed by the questioning of the Trial Examiner, there is no union in any of the Hy-Vee retail stores. But the mere fact that Mr. Marshall and Mr. Clemons would prefer not to have the union, does not brand them as violators as deduced and declared by both the Trial Examiner and the Board in this case. Each of the employees were told several times that they had the right to make their own decision as to the union, and that they had the right to have the union if that was their decision. The law provides in Section 9 that bargaining representatives may be selected by an election, and the methods and procedures are set out. If a union is selected as the bargaining representative by a majority of the employees, the Board issues a certificate certifying that the union has been designated by the employees by an election. Notwithstanding the decision of this Court in National Labor Relations Board v. Gissel, 345 U. S. 575, there is no method mentioned or recognized in the National Labor Relations Act for the selection of a bargaining representative by employees in a proper unit, other than by an election. In the case at bar there was no certification by the Regional Director of the Board or by the Board of the union as the bargaining representative of the Meat Department employees. The evidence here is that the union had for about two weeks authorization cards signed by five of the six employees. By the end of the two week period three of the five employees had rescinded. Therefore there was no majority.

It is a rule of the Board that a certification endures for one year, and there can be no new election or a de-

certification election within that year. There is no provision in the law which says that a non-certified union can continue representation if once designated by a majority of the employees, for one year or for any period of time. There is nothing in the law which would prevent the employees in such a case from rescinding the next day or any day. In the case at bar it was just two weeks.

In this connection we call attention to the Seventh Circuit Court of Appeals case of National Labor Relations Board v. Abrasive Salvage Company, 285 F. 2d 552, 555. There the Court quoted with approval from another case as follows:

> "The union had neither been certified nor recognized as a bargaining agent for respondent's employees and no negotiations for a contract were pending. The designation of a bargaining agent is not irrevocable." (citing cases.)

This is the exact situation here. The employees did revoke their authorization of the union and we submit that those rescissions are valid and must be recognized by this Court.

It is well known that the Taft-Hartley Act was enacted in 1947 because of the extremely vicious pro-union provisions of the Wagner Act (National Labor Relations Act) enacted in 1935. The Taft-Hartley Act was supposed to remove those extremely vicious provisions. The Court will note that the Taft-Hartley Act is an amendment to the National Labor Relations Act. Yet, in its administration of the Act, the Board has continued many of the vicious attitudes and actions on the part of the Board which the Taft-Hartley Act was supposed to remedy. This situation as it has existed in the past, is the reason the Courts in the cited decisions say that the current and present law enjoins upon the Courts the duty to carefully

review the evidence in each case brought before the Court to determine if the decision and order of the Board is supported by substantial evidence on the record considered as a whole.

In *National Labor Relations Board v. Alva Allen Industries, Inc.*, 369 F. 2d 310, by the Eighth Circuit Court, it is stated as follows:

> "Nonetheless, when it is apparent that the union no longer represents a majority of the employees the unilateral refusal to bargain with the union after the one-year period of time will not rise to the dignity of an unfair labor practice" (citing cases).

Further, in the last cited case this Court said:

> "Clearly, 'unusual circumstances' will justify a company in challenging the majority status of the Union any time during the certification year."

In the Alva Allen case the Circuit Court stated that in looking at the totality of the company's conduct, it did not believe that the company refused to bargain in bad faith. There as here the union did not represent a majority of the employees. However, in our case Hy-Vee initially agreed to meet with the union for a first meeting on August 19, 1968. Five days before that date Hy-Vee was advised that the three men had rescinded their authorizations and that there remained only two union advocates out of the six employees. There had been no negotiations and no meetings in our case. Under these "unusual circumstances" if Hy-Vee had negotiated, it would have violated the rights of a two-thirds majority as given to them under Section 7 of the Act which provides that the employees shall not only have the right to self-organization and to unionize, but they "shall also have the right to refrain from any or all of such activities." The Board and the Courts owe a duty to these

employees to protect their basic rights under this provision of the law.

In Acme Products, Inc. v. National Labor Relations Board, 389 F. 2d 104, the Eighth Circuit Court again had before it a consideration of the substantiality of the evidence upon the record as a whole to support the Board's order. That Court there reversed enforcement and denied the order of the Board. The Court there stated:

> "The law applicable to the charges has been considered and discussed frequently by this court and other courts and appears to be well settled. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456, teaches that the findings of the Board must be supported by substantial evidence on the record as a whole."

Further in this same case is the following:

> "The Board is entitled to draw reasonable inferences from the evidence but some substantial evidentiary basis must exist to support the inferences drawn. Inferences cannot be based purely on speculation."

The decision of the Eighth Circuit Court in our case is violently contrary to the principle as stated in the above cited cases. A Justice cannot read the record in this case and arrive at any conclusion other than that there is a failure of proof on the part of the General Counsel.

We again call attention to National Labor Relations Board v. Alva Allen Industries, 369 F. 2d 310, 318 and 319. It is there stated:

> "The Board must start with the presumption of lawful conduct and good faith. Burden of proving wrongdoing is on the General Counsel."

Further we quote the following:

"Unusual circumstances will justify a company in challenging the majority status at any time during a certification year."

In National Labor Relations Board v. J. M. Machinery Co., 410 F. 2d 587, a card case, it is stated at the bottom of page 595 that if representation is not the intent, the cards should be revoked. We cite the Court to the discussion in the opinion of that case on page 596 relative to the effect of the revocation of cards and the lack of revocation. The Court accepted the withdrawal cards and reversed the Board.

A late case is National Labor Relations Board v. Kay-Electronics, Inc., 419 F. 2d 499, 502 where it is stated:

"In reviewing the Board's enforcement order, we of course, must assure ourselves that the record contains 'substantial evidence' to support the Board's findings. In applying this standard, we must evaluate the evidence the Board relies upon *by considering as well the evidence that detracts from such contention.*"

In the case at bar we submit that when the true context and setting in which each alleged statement was made, is read and considered, it will be noted that there is no justification or basis for the inferences drawn by the Board in this case.

Wage Raises Given Were Proper Because They Had Been Promised Prior to Any Union Activity

One of the charges is that Hy-Vee raised the wages of Joe Harker and Charles Baker in the latter part of October, 1968. They are two of the three employees who signed withdrawals from the union. It is charged that these raises were given "in an attempt to insure that they

would testify in this proceeding in a manner sympathetic and helpful to Respondent's case." It is charged that the formal Complaint herein was issued on October 15, 1968, and was served the next day on counsel for the Company in Des Moines, Iowa. It was therefore deduced and assumed by the Board that this wage increase had to have been given for the sole purpose of bribing these two employees to testify favorably at the hearing on November 19, 1968. This charge shows the vicious anti-employer attitude of the Board and of those in its employ. This charge is simply ridiculous and has no basis even remotely of any kind or character. It is a wild assertion by a highly prejudiced employee of the Board. There is not even a scintilla of evidence indicating any such a thing.

The undisputed evidence is that both Joe Harker and Charles Baker were placed in the Meat Department to learn the job and to become journeymen meat cutters. There is no dispute or denial in the record anywhere that Mr. Marshall, the Store Manager, in December, 1967, told both Joe Harker and Charles Baker that they would be given wage increases in the fall of 1968. It will be remembered that the union agitation began on August 6, 1968 with the demand by Mr. Wolff, the union representative, for recognition and bargaining. We have set out in a previous division hereof the true record as to the wage increases, and why they were not paid earlier than the latter part of October, 1968. There is no question in the record but that these increases were promised in December, 1967. This was long before the union was called by employee Marjorie Gibbons the latter part, about the 28th or 29th of July, 1968. Four of the authorization cards were signed at a union meeting on July 30, 1968. The fifth was signed a few days later.

As we have pointed out in the discussion of the evidence under the subdivision heading "Employee Charles Baker",

Mr. Marshall, the Store Manager was under the impression that he was not permitted under the law to pay the promised wage increases after he was informed of the union activity on August 6, because of the union organizing situation, and he so stated. Mr. Baker testified that he talked with Mr. Wolff, the Union Representative, about this promised wage increase, and Mr. Wolff told him that if it had been previously promised if could be paid. These discussions by Mr. Marshall and Mr. Clemons with Baker began in the forepart of August. This was long before the decision by Marshall on August 14, 1968 to write the union that he had learned it did not represent a majority of the employees and that he therefore would not recognize it, and there would be no reason for the meeting with the union on August 19, 1968.

The rule is well established that no benefits can be given during a union drive, and Marshall was observing that rule. It will be remembered that Baker had been moved from the Grocery Department into the meat department to learn to be a meat cutter. He would not become proficient therein for a considerable period of time. The same was true with Joe Harker. They each were promised a raise, to be given in the fall of 1968. These matters were discussed many times before the Board signed its formal Complaint. It had already been decided prior thereto to pay these raises and to give these two men the journeymen meat cutter rate. Therefore, because the raises had been previously promised prior to the union activity, and because Mr. Wolff, the union representative, said that having been previously promised they could be paid, and Mr. Clemons having then consulted counsel was also told if the raises were previously promised that they could be paid, the company decided they had been wrong, and that the wage increases were due and should be paid, and they did pay them the latter part of October, 1968. That was still in the fall of 1968. Simply because the Board in its

unjustified zeal issued its formal Complaint on October 15, 1968 and mailed it to counsel for the company in Des Moines, Iowa, does not imply that the filing of the Complaint motivated the payment of the wage increases. This is a wild hallucination on the part of whoever designed this charge, and has no basis or substance in the evidence and the record.

There are dozens of cases in the services of decisions by the Courts and the National Labor Relations Board holding that wage increases promised prior to union activity can be paid without question. We will cite a few of those Court cases.

The First Circuit had a similar question before it in *National Labor Relations Board v. Gotham Industries, Inc.*, 406 F. 2d 1306. The Court there stated the following which is applicable to the case at bar:

> "In light of the fact that the employer came forward with affirmative evidence of proper business justification, the ultimate burden was upon the Board to show that the promise was primarily motivated by an anti-union purpose. *Jervis Corp. v. Bolivar Division v. NLRB*, 6 Cir., 1967, 387 F. 2d 107, 113 n. 4; *NLRB v. Crosby Chem., Inc.*, 5 Cir., 1960, 274 F. 2d 72, 74 n. 5; see also *NLRB v. Bilten Shoe Co.*, 1 Cir., 1968, 397 F. 2d 801, 803." (page 1309).

The Court in the last cited case also reviewed the Trial Examiner's unsustained conclusions, similar to those in the case at bar. The Court stated:

> "In any event, we find the examiner's statement of reasons unimpressive, standing alone, and on the record as a whole even more so." (page 1310).

Further in this *Gotham Industries* case the Court commented upon the Trial Examiner's conclusions as follows:

"It is very easy for the examiner to say there was no 'adequate' reason for the early announcement of the wage increase. Even with his ex post facto view of the situation, however, he makes no suggestion of what respondents were to do short of offering such satisfaction to dissident employees. If an examiner is going to exercise business judgment, he should at least offer some business alternative" (page 1312).

In *Inco Container Co. of Harrisonburg v. National Labor Relations Board*, 346 F. 2d 178, the Seventh Circuit Court in commenting upon a pre-promised wage increase quoted with approval from a Fourth Circuit case as follows:

"*Certainly it cannot be laid down as a governing rule that during a union campaign, management must deny to its employees increased advantages which in the absence of the campaign would be granted.* * * * But when all the facts in the pending case are carefully considered, it is seen that the Board's conclusion that the purpose and effect of the wage increase was unlawful and unfair is based only on an inference too tenuous to support its order" (page 181).

In *National Labor Relations Board v. C. L. Frank, Inc.*, 351 F. 2d 35, authorization cards were involved, as in the case at bar. There as here, three employees changed their minds about having the union represent them. The employer knew of this rejection and that the union did not have a majority of the employees. He told the employees that the company had previously scheduled a wage increase to go into effect on the following January 1st. This had been determined some time before. He said the company had planned to make the announcement at the Christmas party. Also employees were dissatisfied with the supervision of the loading platform. The

employees indicated they wanted one Herron to direct that work. The employer ordered this change. Relative to the promised wage increase and the change in the loading platform direction, the Court in its opinion stated:

> "And, in the context here involved the mention of the scheduled increase in wages and the resolution of the loading order directions matter are, if technical violations, so *de minimis* in nature as to afford no substantial basis for the Board's conclusions that they resulted in the dissipation of the Union's majority and warrant the remedy awarded" (page 37).

We submit that likewise in the case at bar, these two wage increases undeniably promised the preceding December were justifiable. In any event, even though the Trial Examiner thought a 60 cent an hour increase to each of these two men was high, such was so de minimis in nature as to afford no substantial basis for the Board's conclusions that they resulted in the dissipation of the union's majority. Remember that both Baker and Joe Harker had signed and sent their letter of recission to the union long before they were paid the wage increase, or knew it would be paid. There never was any talk about their testimony to be given later at the hearing.

There can be no question under this record, but that employees Joe Harker and Charles Baker, had been definitely promised in December 1967 a wage increase to be paid in the fall of 1968. It is unfortunate that Mr. Marshall in being overcautious not to violate the law or to commit an unfair labor practice, thought he was prohibited from paying the promised wage increases during the union organizational activity. Even Mr. Wolff, the business agent for the union, said it should be paid if promised. Counsel for the company upon being asked about it, also informed Mr. Clemons that it should be paid. Yet, the Trial Examiner in his zeal to condemn

and convict this company simply because the union in the ordinary course of events lost its majority, went out of his way to imagine and infer that Mr. Marshall and Mr. Clemons wrongfully used the situation to defeat the union. As hereinbefore pointed out, neither the Trial Examiner nor the Board can indulge in such strained deductions and inferences. The record evidence is undeniably against any such an inference.

We again call attention to the fact that each charge in the Complaint involves wild assumptions and imaginations on the part of the Board and of the Trial Examiner in their zeal to convict this company.

Because this attitude permeates this whole prosecution, it has been necessary for us to fully and in detail set out the true facts and record to show that the record as a whole establishes and proves the exact opposite of the charges, and clearly establishes that there were no unfair labor practices committed. Simply because three employees discovered that they had signed the union cards impulsively and for no good reason, and therefore cancelled them, does not perforce mean that the company illegally and wrongfully induced that action. Under the law, there has to be evidence and facts and need of the specific alleged improper conduct. There is none here.

The decision of the Eighth Circuit Court of Appeals herein is equally subject to the same attacks, because there is no evidence in this whole record as to the commission of any unfair labor practices or acts on the part of either Mr. Marshall or Mr. Clemons, or of Hy-Vee Food Stores, Inc.

We regret the necessity for this extensive Petition for Writ of Certiorari, but under the circumstances, and the rule of law applicable, namely, that the findings of the Board must be established by substantial evidence on the record as a whole, a review of that record is imperative.

CONCLUSION

Hy-Vee Food Stores, Inc., respectfully requests this Court to grant its Petition for a Writ of Certiorari, so that on final hearing this Court can determine the basic issue in this case, namely, whether the findings of fact of the National Labor Relations Board are supported by substantial evidence on the record considered as a whole, and whether the Per Curiam Decision of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed.

There are several additional matters in this case which have not been presented in this Petition for a Writ of Certiorari, but which will be submitted upon final submission, and which we believe will contribute to the grounds for a reversal of the decision of the Court of Appeals. The Congress in the National Labor Relations Act specifically enjoined the duty upon the Courts to police the National Labor Relations Board decisions and to insure that the Board did not act arbitrarily. It is specifically provided that the findings and decision of the Board may be reviewed by the Circuit Courts, and the Statute and the prior decisions of this Supreme Court state that the review must be realistic. It is then provided that the Supreme Court of the United States shall review the Board's findings and decision upon Writs of Certiorari to review the decisions of the United States Circuit Courts thereon.

As stated, the Trial Examiner in this case in his fact findings deliberately misstated the testimony and evidence, took phrases out of context and attributed meanings to them which is opposite to the context, and made findings and recommendations to the Board which not only are not sustained by substantial evidence on the

record as a whole, but not even remotely mentioned in any evidence.

In closing, we again call attention to the provisions of Section 7 of the National Labor Relations Act which states plainly that although employees have the right to bargain collectively through union representatives of their own choosing, they "shall also have the right to refrain from any or all of such activities." As stated, it is also basic that the Courts are required by the law to police the Labor Board and to protect employers in their constitutional and statutory rights, who are trying to provide jobs under the many difficult situations in our economy.

We respectfully request that our Petition for a Writ of Certiorari herein be granted.

Respectfully submitted

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APPENDIX

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Employer's Answer to Amendments to Complaint

Comes now Hy-Vee Food Stores, Inc. on behalf of its store at Kirksville, Missouri and for answer to the amendments to the Complaint filed by Counsel for the General Counsel and dictated into the record after the commencement of the hearing herein, states:

1. The amendment to the Complaint purports to amend paragraph 9 thereof by amending paragraph (a) and by adding to said paragraph 9 subparagraphs (d), (e), (f) and (g).

a. The respondent denies the allegations of the amendment to paragraph 9(a), and states that no threats of any kind or character were made to any employee at any time.

b. Answering paragraph (d), respondent states that bonuses were paid to employees qualified and entitled to receive same for the months of September and October of 1968, and states that said bonuses were paid to employees eligible therefor throughout the store under and in accordance with a long established bonus plan and formula. Said plan has been in effect for a great many years, has been approved by the Internal Revenue Service, and no employee of the meat department was given any different bonus than employees in any other department of the store. Further said bonus plan is in effect in each and all of the sixty-three stores operated by the respondent.

c. Answering paragraph (e), respondent states that raises were given to certain employees in the meat department in accordance with an agreement and statement to pay same many months prior to the time the union began any organizational efforts at the store, and said agreements to pay increases in compensation were made in December of 1967. Said raises and compensation had nothing whatever to do with the union activity, but were given only in accordance with pre-existing plans and commitments.

d. Answering paragraph (f), respondent denies that it in any way improperly influenced the testimony of any employee or attempted to wrongfully influence the testimony of any employee in this proceeding and denies it threatened, intimidated or coerced any employee with respect to his testimony in this proceeding.

e. Answering paragraph (g), respondent denies that it ever through any of its officers or supervisory employees made any threats or promises of benefits.

Respondent states that the allegations of said amendments are so general and indefinite, that respondent cannot adequately respond thereto, and that same should be stricken in accordance with the motion to strike made on the record after said amendments were dictated into the record, and after the hearing had begun.

2. Respondent readopts and restates its answer to the Complaint heretofore filed, and specifically denies that respondent through any of its agents has committed any unfair labor practice act of any kind or character.

Wherefore, it is respectfully submitted that the Complaint as amended should be dismissed for each and all

of the reasons stated in respondent's answer and in this amendment to the answer.

Dated this 20th day of November, 1968.

Neill Garrett
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Des Moines, Iowa 50309
Attorneys for Respondent-Employer

United States Court of Appeals
For the Eighth Circuit

Decision

[June 5, 1970]

Before Matthes, Lay and Heaney, Circuit Judges.

Per Curiam.

Hy-Vee Food Stores, Inc., has petitioned this court to review and set aside the order of the National Labor Relations Board issued May 21, 1969, and the supplemental order of the Board issued September 24, 1969. The Board has filed a cross-application for enforcement pursuant to § 10(e) and (f) of the Act.

The Board's original decision and order are reported at 176 NLRB No. 5; 71 LRRM 1271. The supplemental decision and order are reported at 178 NLRB No. 101; 72 LRRM 1190.

Following a hearing, the trial examiner filed an exhaustive decision. On the basis of the credited evidence the examiner found that petitioner had engaged in unfair labor practices in violation of § 8(a)(1) and (5) of the

Act. The examiner recommended: (1) a cease and desist order; (2) that upon request petitioner recognize and bargain collectively with Amalgamated Meatcutters & Butcher Workmen of North America, AFL-CIO, Local Union 576, as the exclusive representative of the employees in the meat department of petitioner's store in Kirksville, Missouri. The examiner's findings and recommendations were adopted by the Board as evidenced by its original and supplemental decisions, *supra*.

Petitioner submits, on the basis of a number of points set out in its brief that the Board's decisions and orders are "arbitrary, capricious and un-American," and hence must be set aside. In our view, three basic questions are presented: (a) whether there is substantial evidence on the whole record within the teachings of the Supreme Court in **Universal Camera v. N. L. R. B.**, 340 U. S. 474 (1951), to support the Board's findings of § 8(a)(1) and (5) violations; (b) whether the order requiring the company to bargain with the Union is appropriate under the circumstances of this case; (c) whether the Board's unit determination is proper.

Pursuant to the admonition of the Supreme Court in **Universal Camera**, we have carefully canvassed the whole record and are left with the firm conviction that the Board's findings are supported by substantial evidence. Under the standard enunciated in **Universal Camera**, it is settled that a reviewing court may not ". . . displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matters been before it *de novo*." 340 U. S. at 488. **Accord, N. L. R. B. v. Walton Mfg. Co.**, 369 U. S. 404, 405 (1962).

We are likewise convinced for the reasons enunciated by the Board in its supplemental decision, and on the authority of **N. L. R. B. v. Gissel Packing Co.**, 395 U. S. 575,

613-16 (1969), that the order requiring petitioner to recognize the union and bargain with it is proper.

Finally, we hold that the Board did not act arbitrarily or abuse its discretion in determining that the meat department employees constitute an appropriate unit. See **Packard Motor Company v. N. L. R. B.**, 330 U. S. 485, 491 (1947); **N. L. R. B. v. William J. Burns Int. Detective Agency**, 346 F. 2d 897, 900 (8th Cir. 1965).

The petition to set aside the Board's order is denied. Enforcement of the order is granted.

United States Court of Appeals
for the Eighth Circuit

Judgment

(Filed June 29, 1970

Before: Matthes, Lay and Heaney, Circuit Judges.

This Cause came on to be heard upon the petition of Hy-Vee Food Stores, Inc., to review the order, of the National Labor Relations Board of May 21, 1969 as reaffirmed, by its order of September 24, 1969 against Petitioner, its officers, agents, successors, and assigns, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on April 14, 1970, and has considered the briefs and transcript filed in this cause. On June 5, 1970, the Court being fully advised in the premises, handed down its decision denying the petition to review and granting enforcement of the Board's Order. In conformity therewith it is hereby

Ordered and Adjudged by the United States Court of Appeals for the Eighth Circuit that the said order, as reaffirmed, of the National Labor Relations Board in said proceeding be enforced, and that the Petitioner, Hy-Vee

Food Stores, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

United States Court of Appeals
for the Eighth Circuit

Stay Order

June 29, 1970

On consideration of the motion of petitioner for a stay of issuance of certified copies of judgment in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the certified copies of judgment herein be, and the same are hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

United States Court of Appeals
for the Eighth Circuit

Second Stay Order

July 23, 1970

On motion of counsel for appellant, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed to and including August 12, 1970. If within said period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United

States that a petition for writ of certiorari and record have been filed, the further stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Cross-Examination of Don Harker

Before the Trial Examiner
From Addendum to Brief in Eighth Circuit Court of Appeals

The General Counsel includes the direct examination of Donald Harker in the Appendix, pages 96-100. Important cross-examination is not included, and petitioner sets that out as follows:

Don Harker testified that he hadn't known that Hy-Vee couldn't give him added benefits, etc., until the union matter was settled. He didn't understand that increases in compensation could be paid if they had been promised prior to the union activity. In this regard he testified:

"Q. (By Mr. Garrett) Don, they explained to you, didn't they, that they had promised that raise to your brother before the Union came in? A. Yes, sir.

Q. And didn't they explain to you that while the Union organization activity was on they couldn't promise you anything or do anything for you while that was going on? A. Yes.

Mr. Kimbrough: What date are you referring to?

Mr. Garrett: I am referring to all of the dates that they talked to him and the effects of them.

Q. (By Mr. Garrett) So you understand when they explained to you as to why Joe got a raise, it is because it had been promised to him since way last December? A. Yes.

Q. And you didn't understand that before? A. Right.

Q. And that made the difference, to your thinking? A. Right.

Q. You weren't complaining about the bonuses then, were you? A. No.

Q. So when you found out that the company couldn't promise you anything while the Union activity was on but that they could do what they had promised to do before the Union activity that satisfied your thinking? A. Yes.

Q. I see.

Now, did Mr. Clemons or Mr. Marshall tell you that you had a right to belong to the Union if you wanted to? A. Yes, sir.

Q. They said that was your own business? A. Yes.

Q. And you understood that you could? A. Yes.

Q. Do you know of anything that could be called a threat that either of them made to you?

Mr. Broun: Objection, conclusion.

Trial Examiner: Sustained.

* * * * * * *

Q. You understand that now? A. Yes.

Q. And part of your difficulty was misunderstanding this? A. That is right.

Q. And when your father called them out there to the house last night (Mr. Marshall and Mr. Clemons), that was to find out why you didn't get a raise? A. That is right.

Q. You were present? A. Yes, I was.

Q. And they satisfied your father on that, didn't they? A. Yes.

Mr. Kimbrough: Objection, conclusion. That is in there. Forget it. I will withdraw it.

Q. (By Mr. Garrett) So your biggest problem has been your misunderstanding of various things?

Mr. Kimbrough: Objection.

Trial Examiner: Sustained, don't answer it.

Mr. Garrett: That is all."